



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 787 OF 2003

JAMES NJUGUNA WAINAINA..... 1ST PLAINTIFF
ROSEMARY NJERI WAINAINA..... 2ND PLAINTIFF
VERSUS
EAST AFRICAN BUILDING SOCIETY..... DEFENDANT

RULING

By a ruling delivered on 13th June, 2007 interpreting the provisions of the charge document dated 26/4/95, the subject of the suit herein, the Honourable Azangalala J ordered that Ms Ernest & Young Auditors do compute the interest due under the said charge in terms of the courts interpretation of the same. It would seem that the said firm of auditors declined the appointment and thereafter the parties entered into negotiations directly as well as through their respective Advocates. Consequent thereto, the Plaintiffs made a cheque payment of Kshs. 523,000/- as settlement of the interest due which the Defendant banked.

By a Notice of Motion dated 11th April, 2011 and expressed to be brought under Order LI Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiff applied for an order that the matter herein be deemed as wholly settled upon payment by the Plaintiff and receipt by the Defendant of Kshs.523,000/-

It was contended by the Plaintiff that consequent upon discussions between the parties, the Plaintiff paid to the Defendant a sum of Kshs. 523,000/- in full and final settlement of the account, that the payment was made by a negotiable instrument, cheque No. 149242 dated 27/1/2009, that the payment was made conditional on it being full and final settlement.

Mr. Bwire, learned Counsel for the Plaintiff submitted that under the doctrine of accord and satisfaction, the Defendant having negotiated the negotiable instrument, the cheques which had been paid to them conditionally were bound by the terms thereof, Counsel cited the text from **Halsburys Laws of England 3rd Edition Vol. 8** for the proposition that acceptance of a cheque of a lesser amount may be taken to be satisfaction. Further, Counsel relied on the cases of **Goddard and Son –vs- O’Brien 1882 2 QBD**, **Wicks –vs- First National Picture (Australasia) Ltd (1931) 31 SR**, **Homeguard Products –vs- Kiwi Packaging (1981) 2 NZLR 322**, **Leon Richards and Elaine Richards –vs- Roy Kees & Anor CA No. 30467 of 2002** and **Elo Marketing Inc –vs- Robert Hardesty DBA Business Pricing Systems** to buttress his argument that this case satisfied the application of the doctrine of accord and

satisfaction. Counsel therefore urged the court to allow the application.

The Defendant filed a Replying Affidavit sworn by Caroline Mbenge sworn on 9th June, 2011 and written submissions dated 14th February, 2012. The Defendant admitted that there were negotiations after Ernest & Young had declined their appointment, that however, the negotiations did not result in any settlement figure. That pursuant to the negotiations, the Defendant made its own calculations and arrived at Kshs.3,705,805/28 as the amount due from the Plaintiffs, that the Defendant offered the Plaintiffs to have the suit settled on payment of the said Kshs .3,705,805/28, that the Plaintiffs' Advocates forwarded a Bankers Cheque for Kshs.523,000/- in full and final settlement of the debt and asked the Defendant to confirm the terms of the offer, that the Defendant did not confirm or communicate any acceptance to that offer, that a replacement cheque No. 149242 for a similar sum was received without prejudice to the Defendant's rights, that the mode of communication between the parties was through correspondence, that there was no agreement as to the payment of the sum of Kshs. 523,000/- in full and final settlement of the debt owed by the Plaintiffs, that the Defendant decided to repay the Plaintiffs the said sum of Kshs.523,000/- by way of a bankers cheque but the Plaintiffs rejected the same and that there was no accord. The Defendant further contended that for there to be accord and satisfaction there needed to be assent and the meeting of the minds and that examination of the correspondence between the parties would show that there was no consent whatsoever to settle the matter at Kshs. 523,000/- as asserted by the Plaintiffs.

The Defendant relied on the cases of **H.B.F Dalgety Ltd –vs- Morton (1987) 2 NZLR 187, Budget Rent a Car Ltd –vs- Goodman (1991) 2 NZLR and Spellma & Walker Co, Ltd –vs- U.O.N (2005) HCCC No. 2168 of 1996** in support of its case.

I have considered the Affidavits on record, the written submissions, Counsel's oral hi-lights and the authorities relied on.

The Applicants contention is that the Defendant's action of accepting and encashing the Plaintiffs cheque for Kshs.523,000/- constituted accord and satisfaction of the claim.

Before I consider the application, I propose to examine the law on the doctrine of Accord and Satisfaction.

The definition of Accord and Satisfaction was made in the English case of **British Russia Gazette and Trade Outlook Ltd –vs- Associated Newspapers Ltd (1933) 2 K.B. 616** wherein at page 643 Scrutton L.J held that :-

“Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which, the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.”

Although the Plaintiffs extensively cited the cases of **Wicks –vs- First National Picture (Australasia) Ltd and Homeguard products –vs- Kiwi Packaging (1981) 2 NZLR 322** in their submission they did not supply the court with copies thereto.

In **Budget Rent A Car Ltd –vs- David Stanley Goodman (1991) 2 NZLR 715** the Plaintiff had received on account the Defendant's cheque of \$ S 5000 in full and final settlement of a debt of over \$15,000/- but had promptly advised the Defendant that it did not agree to the Defendants condition of such payment. After receiving various cases in that country on the doctrine of accord and satisfaction, the High Court of Newzealand held at page 11 thereof:-

“In those circumstances this court is of the view that it could not be said that the banking of the cheque amounted to the irretrievable manifestation of assent such as the cases require in order to constitute accord and satisfaction.”

In the case of **James Wallace Property Ltd –Vs- William Cable Ltd (1980) 2 NZLR 187** the Court of Appeal for Newzealand while considering the application of Accord and Satisfaction in that country held that:-

“In that it involves the acceptance of something less than the carrying out of the contract itself, accord and satisfaction differs from a discharge by performance. It is a new agreement under which the party in default is relieved from his former liability by a promise to do something other than what he was obliged to do by the former contract. It is the essence of an accord that there must be an agreement. Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances of each case.”

In the case of **H.B.F. Dalgety Ltd –vs- Morton (1987) 1 NZLR 411, Hillfer J** held at page 416 – 417 thus:-

“If the question is one of fact, there will be accord and satisfaction only if there is a meeting of two minds, or if one of the person involved acts in such a way as to induce the other to think the money is taken in satisfaction of the claim. but if the creditor does not agree, and if at the time that he accepts the amount he makes it clear to the debtor that he is not accepting it in full satisfaction, it seems to me that it cannot be said that there has been accord and satisfaction. If there were a rule of law that acceptance of a cheque is conclusive evidence of assent to the conditions on which the cheque was sent, the matter would no longer be a question o fact, but of law.”

Finally in **Heines Huse Haulage Co. Ltd –vs- Gamble (1989) 3 NZLR 221 Barker J** held at page 225 that:-

“..... it seems that there is some onus on a creditor wishing to escape the consequences of the general rule that an inference is to be drawn from the banking of the cheque in favour of the debtor, the creditor should very promptly indicate its dissent from the basis on which the cheque was sent.”
(Emphasis mine)

This is how the courts have applied the doctrine of Accord and Satisfaction in Newzealand.

The doctrine has also been applied in equal force in the United States of America. In the case of **Leon Richards & Anor –vs- Roy Kees & Anor (2002) case No. 00-C0237** the Supreme Court of West Virginia held that :-

“Although ECO sought to conditionally accept Hardesty’s payment through its actions, the law is very clear that ECO’s tendering of the check resulted in an accord and satisfaction. See Estate Landscape, 844 P.2d at 330 (“Where, as here, the check is tendered under the condition that negotiation will constitute full settlement, mere negotiation of the check constituted the accord, regardless of the payee’s effort or intent to negate the condition.” (Emphasis added): see also Utah Code Ann.#70A-3-311(2) (2001) (stating that “the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim”). Because ECO negotiated the check, its subjective objections are irrelevant. See Estate landscape, 844 P.2d at 330. ECO’s “options were to accept the check [] on the [*4] debtors’ terms or to refrain from negotiating the check [] and seek the entire sum [] through the judicial process.” *Id.* Because ECO’s “negotiation of the check constituted acceptance of the accord and satisfaction as a matter of law,” we conclude that the trial court did not err in granting Hardesty’s motion to dismiss. *Id.*”

In **Margaret Mossing –vs- Demlow Products Inc & Anor LC No. 07-002620 – CK** the Court of Appeal of Michigan when considering a case where a defendant had tendered a lesser sum than the amount due in final payment held:-

“Not only did the defendants send a check containing the words “JUNE 2006 FINAL PMT.” on the memo line, but it also was sent with correspondence indicating defendants’ intention to terminate the

contract. Upon receiving this check and correspondence, plaintiff's attorney sent a responding correspondence stating:

My client received a check of \$7364.94, representing a payment for June. The memo on the check also indicated that it was final payment. As you know, the issue of future payments is in dispute in this matter and therefore, the check is being cashed with the understanding that it is not, in fact, a final payment.

Plaintiff fully understood that the check was tendered for final payment. Not only did Plaintiff acknowledge in this correspondence that it was for final payment, she cashed the check knowing that the check was intended to be for final payment. This was proper accord and satisfaction according to MCL 44.3311(4), and the trial court did not err by granting summary disposition on this issue."

From the foregoing authorities, the principles that come out clearly are that for there to be accord and satisfaction there must be a dispute as to the amount due, the amount due must exceed the amount tendered by the debtor, the debtor must indicate at the time of such tender that the sum is being tendered in full settlement of the debt, the creditor must accept such tender by receiving the amount tendered by either negotiating the instrument of such tender, encashing the cheque or any other mode of acceptance of such tender.

From case law, it would seem that once the foregoing is proved, the American Courts would accept that there has been accord and satisfaction. However, in Newzealand, the courts there impose the condition that the debtor must show that there has been assent by the creditor, that there is the meeting of the minds such that if at the time of accepting the amount tendered, the creditor indicates unequivocally that he does not accept the cheque so tendered on the condition on which it is so tendered, there would be no accord and satisfaction.

How does the foregoing apply to the case before court? It would seem that once the firm of Ernest & Young declined to arbitrate in the matter after the court had referred the matter to that firm of auditors, the parties herein entered into lengthy negotiations which culminated in each party arriving at a different figure as to the amount of interest due in terms of the court order of 13th June, 2007. The Defendant arrived at a sum of Kshs.3,705,850/28 which it communicated to the Plaintiffs through their lawyers on 3rd December, 2008. The Plaintiffs response was a letter of 22nd January, 2009 which read:-

"We refer to the above matter and acknowledge receipt of your letter dated 14th January, 2009.

Our clients Accountants/Auditors have gone through the Statement of Account in accordance with the High Court Ruling and the amount due to your client is the sum of Kshs.523,000/- by way of accrued interest.

We forward herewith a Banker's Cheque No. 140070 for the sum of Kshs.523,000/- in full and final settlement of the debt due to your client.

Please confirm the foregoing and kindly let us have the original Title documents to enable us draft the requisite discharge." (Emphasis supplied).

The cheque was however in the wrong name of the Defendant. The actual cheque in the proper name of the Defendant was delivered vide the Plaintiff's Advocate's letter dated 28th January, 2009. The Defendant's response through its Advocates was swift and categorical vide a letter dated 29th January, 2009 stating:-

"We refer to your letter of the 28th instant enclosing a banker's cheque No. 149242 dated 27th January, 2009 for Kshs. 523,000/- of which we acknowledge safe receipt

This is accepted for and on behalf of our client without prejudice to its rights.

As you are aware our client's calculations are Shs.3,705,850/28." (Emphasis supplied)

There followed a flurry of correspondence culminating in the Defendant sending the Plaintiffs a cheque for Kshs.523,000/- when it appeared that the Plaintiffs had stuck to their guns that the sum had been paid in full and final settlement of the amount due.

On the foregoing circumstances, has there been accord and satisfaction? It is not in dispute that the court had directed the parties to the firm of Ernest & Young Auditors for the recalculations of the interest in dispute. It is also not in dispute that after the said firm of auditors declined such appointment, the parties went into deep negotiations as correspondence will show. It is an undisputed fact that the Plaintiffs offered to settle the debt at Kshs.523,000/- in full and final settlement of the debt due. Their cheque was accepted and encashed by the Defendant.

In the American sense there has been accord and satisfaction and the Defendant cannot rescile from the position that it accepted the Plaintiffs cheque in full and settlement. The Defendant knew the conditions to which that cheque was attached to but it nevertheless encashed the same.

However, from case law as applied in Newzealand, there would seem to be no accord and satisfaction for the reason that at the earliest opportunity the Defendant informed the Plaintiffs that the cheque for Kshs.523,000/- was not being accepted on the conditions on which it was being tendered. They were informed that:-

"This is accepted for and on behalf of our client without prejudice to its rights. As you are aware our client's calculations are Shs.3,705,850/28."

The rights alluded to herein are the balance of the claim in the sum of over Kshs.3 million. Indeed the Defendant went as far as making out a bankers cheque for Kshs.523,000/- and attempted to return the same to the Plaintiffs which was rejected.

I am inclined to adopt the way suggested by the Newzealand Courts for two reasons. Firstly, on the basis that the basic tenets of accord and satisfaction is that the creditors conduct should lead the debtor to believe that his offer to settle the debt for a sum lesser than the amount due has been accepted by the creditor. This tenet is destroyed if the creditor rejects the debtors tender and/or the conditions upon which the lesser sum is tendered at the earliest opportunity and indicates that the amount tendered is being received on account. In so doing, the debtor is put on notice of the rejection thereby allowing him to pursue his other options, if available. If however, the creditor for example encashes a cheque without any conditions and only communicates his non-acceptance after some time say after seven (7) days, then in my view, he would have led the debtor to believe that his tender has been accepted and there would be accord and satisfaction.

Secondly, the tender by the debtor must be very clear and unequivocal in its terms. I think the debtor should indicate that if the same is not accepted e.g. a cheque, the same should be returned. Clear words to such end should be used. In my view, that will put the creditor on notice that if he encashes the cheque he would have accepted the attaching conditions notwithstanding his position or protestation, that the two options available are, to encash the cheque and he would be bound thereby or to return the funds to the debtor and pursue the greater sum.

In the case before court, the creditor's conduct does not show that there was any assent. The offer by the debtor was rejected on the same day of receipt of the cheque even before the cheque was probably encashed. This is shown by the letter by the Defendants Advocates dated 29th January, 2009.

Further, in the letter of 22nd January, 2009, which contained the terms and conditions under which the cheque and/or the amount of Ksh.523,000/- was being tendered, the Plaintiffs required the Defendant to confirm acceptance of those conditions. It stated in part:-

"Please confirm the foregoing and kindly let us have the original titles...."

My view is, the words “**please confirm the foregoing**” required the Defendant to confirm acceptance of the conditions for which the cheque was being tendered. There is no evidence to show that there was any such confirmation. To the contrary the letter of 29th January, 2009 which was written one (1) day after receipt of the cheque with the correct names of the Defendant, was categorical that the cheque was being accepted without prejudice to the Defendant’s rights to claim the balance. In my view, had that letter not been categorical as it were, I would have held the Defendants to the bargain. Now that it was, I am afraid I do not find that there was any accord and satisfaction.

For the foregoing reasons, I find that, the Plaintiffs Motion dated 11th April, 2011 is without merit and is hereby dismissed with costs.

DATED and DELIVERED at Nairobi this 20th day of April, 2012

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A. MABEYA

JUDGE